FILED
APR 20 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE BORDEN COMPANY, BELMONT DAIRY COMPANY, BOWMAN DAIRY COMPANY, AND RIDGEVIEW FARMS DAIRY, INC., APPELLEES.

STUART S. BALL,
CECIL I. CROUSE,
JOSEPH A. GREAVES,
H. BLAIR WHITE,
Attorneys for Appellees, The Borden Company and Belmont Dairy Company.

L. EDWARD HART, JR.,
JOHN PAUL STEVENS,
JOHN BORST, JR.,
WILLIAM G. MYERS,
Attorneys for Appellees, Bowman Dairy Company and Ridgeview Farms Dairy, Inc.

Of Counsel:
SIDLEY, AUSTIN BURGESS & SMITH,
MONTGOMERY, HART, PRITCHARD & HERRIOTT.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statement 2

I. The Three Evidentiary Rulings Attacked by the Government 7

A. The Eggleston Deposition 7

B. The Newey Tape Recordings 12

C. The Conversation Between Moser and a Deceased Borden Agent 14

II. The Ruling on the Clayton Act Issues 14

Summary of Argument 16

Argument 18

I. The District Court's Rulings on Evidence Were Entirely Proper and Did Not Substantially Affect the Rights of the Parties 18

A. It Was Not Error for the District Court to Limit the Government's Opportunity to Attempt to Impeach the Witness Eggleston by Refusing Counsel Permission to Use a Copy of a Deposition Which Had Been Filed Under Seal in Another Proceeding 21

1. The testimony of the witness Heinz certainly was not vital evidence 23

2. The trial court had several adequate reasons for discounting the testimony of the witness Heinz, entirely apart from the testimony of Eggleston 23

COPY

3. The deposition would not have impeached Eggleston's trial testimony 25
4. Even without the deposition Government counsel had an adequate opportunity to cross-examine Eggleston 28
5. The trial court properly held on March 6, 1953, that the Eggleston deposition was not available to the Government 30
6. The ruling of the trial court was fully justified on independent grounds 32

B. The Government Has Failed to Show Either Error or Prejudice With Respect to the Ruling That the Government Was Not Entitled to Obtain Possession of the Newey Tape Recordings 35

1. The Sole Ruling by the Trial Court, Which Merely Refused to Compel McConnell to Surrender Possession of the Recordings and Transcripts, Became Moot When This Material Was Voluntarily Surrendered to Government Counsel 39
2. The Government Misconstrues the Question Presented When It Asserts That the Trial Court "Excluded" the Tape Recordings 40
3. Although the Issue Is Moot, the Refusal to Compel McConnell to Produce His Work Product, Was Correct, Since the Government Made No Showing of Good Cause for Compelling Its Production 41
4. The Government's Brief Misconstrues the Reason for the Trial Court's Holding That the Testimony of Newey Was "Valueless" 42
5. In the Absence of an Offer of Proof, the Government Can Not Rely on the Discredited Testimony of Newey to Show That It Was Substantially Prejudiced By the Trial Court's Ruling 43

BLEED THROUGH

BLURRED COPY

C. The Trial Court Properly Excluded the Proffered Evidence of a Single Innocuous Conversation Between a Non-Defendant Dairyman and a Deceased Agent of a Single Defendant Occurring Ten Years Before the Trial 51

II. The Trial Court Properly Dismissed the Clayton Act Portions of the Complaint on the Ground that the Government Failed to Prove any Right to Injunctive Relief 53

Conclusion 57

Appendix 59

CITATIONS.

American Ins. Union v. Lowry, 62 F. 2d 209 (5th Cir. 1932) 25

Bragg v. Geddes, 93 Ill. 39 (1879)..... 52

Chicago City Ry. Co. v. Ryan, 225 Ill. 287 (1907).... 26

Chicago Title & Trust Co. v. Merchants' Loan & Trust Co., 244 Ill. App. 302 (1st Dist., 1927)..... 51

Clemens v. Kaiser, 211 Ill. 460 (1904)..... 25

Dean Milk Co. v. American Processing and Sales Co., (N. D. Ill. No. 49 C 1159)..7-12, 15, 21, 25, 29, 30, 35, 55-57

DiCarlo v. United States, 6 F. 2d 364 (2d Cir. 1925).. 33

Dugger v. Kelly, 168 Iowa 129 (1914)..... 25

Ellis v. United States, 138 F. 2d 612 (8th Cir. 1943).. 34

Hecht Co. v. Bowles, 321 U. S. 321 (1944).....54, 55

Helvering v. Gowran, 302 U. S. 238 (1937)..... 19

Herencia v. Guzman, 219 U. S. 44 (1910)..... 49

Hickman v. Taylor, 329 U. S. 495 (1947).....41, 42

Kuhn v. United States, 24 F. 2d 910 (9th Cir. 1928)... 34

Moreen v. Estate of Carlson, 365 Ill. 482 (1937)..... 51

Navajo Freight Lines v. Mahaffy, 174 F. 2d 305 (10th Cir. 1949) 19
Palmer v. Hoffman, 318 U. S. 109 (1943)..... 49
People v. Pfanschmidt, 262 Ill. 411 (1914)..... 25
Prather v. Chicago Southern R. R. Co., 221 Ill. 190 (1906) 25
Silsby, et al. v. Foote, 14 How. 218 (1852)..... 19
St. Clair v. United States, 154 U. S. 134 (1894)..... 33
Southern Ry. v. Gray, 241 U. S. 333 (1916)..... 23
United States v. Block, 88 F. 2d 618 (2d Cir. 1937)... 34
United States v. Borden Co., et al. (N. D. Ill. No. 2088) 2
United States v. Borden Co., et al., 111 F. Supp. 562 (N. D. Ill. 1953)..... 1
United States v. Maggio, 126 F. 2d 155 (3d Cir. 1942). 33
United States v. Oregon State Medical Society, 343 U. S. 326 (1952)..... 56
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940) 23
United States v. W. T. Grant Co., 345 U. S. 629 (1953) 55
Young v. United States, 97 F. 2d 200 (5th Cir. 1938). 33

Statutes.

Clayton Act, Act of October 15, 1914, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526 (15 U. S. C. 13 (a), 25, 26).....2, 3, 14, 15, 17, 53-56
Sec. 2(a) 7, 14, 15, 17
Sec. 15 56
Sec. 16 56
Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended by the Act of March 3, 1911, 36 Stat. 1167, and by the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. 1, 2..... 3, 7

BLEED THROUGH

BLURRED COPY

Expediting Act, Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Sec. 17 of the Act of June 25, 1948, 62 Stat. 869 2

28 U. S. C., Sec. 2111, added May 24, 1949, c. 139, Sec. 110, 63 Stat. 105 19

Illinois Rev. Stat., 1945, C. 51; Sec. 4 52

Miscellaneous.

Report of the Judicial Conference of the United States on Procedure in Antitrust and Other Protracted Cases, dated September 26, 1951, 13 F. R. D. 62 ... 3, 35

Federal Rules of Civil Procedure:

Rule 26 (d) (1) 33

Rule 30 (b) 30

Rule 41 (b) 5, 53

Rule 43 (b) 33

Rule 61 19

Rules of Practice, U. S. District Court for the Northern District of Illinois, Rule 14 10

BLEED THROUGH

BLURRED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464.

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, ET AL.,

Appellees.

N APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

RIEF FOR THE BORDEN COMPANY, BELMONT DAIRY COMPANY, BOWMAN DAIRY COMPANY, AND RIDGEVIEW FARMS DAIRY, INC., APPELLEES.

OPINION BELOW.

The district court's memorandum and order dismissing ıe complaint (R. 80-113) is reported at 111 F. Supp. 562. he opinion and order limiting the issues and the proof R. 48-52), and the findings of fact, conclusions of law, ıd judgment (R. 113-125) are not reported.

JURISDICTION.

On March 30, 1953, the district court entered an order dismissing the complaint (R. 112). On June 17, 1953, the district court entered its findings of fact, conclusions of law and judgment (R. 113-125). On August 6, 1953, the Government's motion for a new trial was denied (R. 151-152). The appeal was allowed on October 2, 1953 (R. 431). The jurisdiction of this Court was invoked under Section 2 of the Expediting Act, 32 Stat. 823, 15 U. S. C. 29, as amended, 62 Stat. 869; the Court noted probable jurisdiction on December 14, 1953 (R. 443).

QUESTIONS PRESENTED.

1. Whether the district court made three errors in rulings on evidentiary matters, and if so, whether these rulings substantially affected the outcome of the trial.

2. Whether the district court abused its discretion in holding that upon the facts and the law the Government had not established a right to injunctive relief against future or recurrent violations of the Clayton Act.

STATEMENT.[1]

On September 16, 1940, defendants Bowman, Borden and certain other dairies consented with the Government to the entry of a decree by the District Court for the Northern District of Illinois enjoining certain alleged violations of the Sherman Act in *United States* v. *Borden, et al.*, No. 2088 (R. 48-51, 114).

On June 18, 1951, the Government filed the instant ac-

1. All references herein to the Government's brief will be identified by "Br." All references to the Appendix attached hereto will be identified by "App." All emphasis hereinafter appearing has been added unless otherwise specifically noted.

BLEED THROUGH

BLURRED COPY

tion against ten defendant dairies (R. 23). The complaint alleged that since "about 1940" the defendants had been engaged in a conspiracy to restrain and monopolize the sale of fluid milk to wholesale customers in the Chicago area in violation of Sections 1 and 2 of the Sherman Act (R. 30), and that since "January, 1941" each of the defendants had been selling fluid milk to wholesale purchasers in the Chicago area at discriminatory prices in violation of the Clayton Act (R. 37).

During July, 1951, the Government served interrogatories on defendants (R. 4). During September, 1951, the Government took the depositions of Messrs. Bello, Bishop and Heinz (R. 4-5). This was the extent of the Government's pretrial discovery.

On the Government's motion, the district court conducted pretrial conferences beginning on February 12, 1953, and continuing daily thereafter until March 4, 1953 (R. 116). Coincidental with the pretrial conference five of the defendants and the Government reached agreement upon the terms of a consent decree. This decree was entered on February 19, 1953 over the objections of the remaining defendants. The consenting defendants did not thereafter participate in the pretrial conferences or in the trial (R. 116).

During the course of the pretrial conference on February 27, 1953, the court entered an opinion and order limiting the issues and the proof (R. 48-52). The trial court stated that it was attempting to follow the procedures recommended by the Committee of the Judicial Conference of the United States of which Judge Prettyman was chairman,[2] with respect to antitrust cases of the magnitude and complexity of the present case (R. 48-49). With certain exceptions, the court ordered that proof be limited

2. The report of the Committee may be found at 13 F. R. D. 62.

to the period after September 16, 1940, the date of the consent decree entered in a prior case mentioned above (R. 51). This order is not attacked by the Government on this appeal.

The trial began March 4, 1953 (R. 116). At the opening session the defendants obtained permission to make general objections to all testimony, in order to condense the argument as much as possible (R. 153-154). In the main, these were objections to testimony and documents relating to one defendant being received as against another defendant on the ground that until the alleged conspiracy had been proved such evidence was hearsay as to the objecting defendant (R. 153-154). With respect to these objections, the court said:

> "Now, the situation here is this. We have no jury here, and it is my thought that insofar as any materiality is shown at all, that I would allow evidence to go in and rule on any objections that may be made as the evidence is offered, and I would also let the evidence in general be subject to these general objections, which I would herein now overrule.
>
> "I do that, however, with the reservation that in the briefs at the end of all the evidence, if it appears that data is not connected up, certain evidence is not connected up, or if it appears from the final testimony that some of it is purely hearsay, that that may still be argued by the parties in their briefs, and in that way we will save considerable time in getting the evidence in before the Court as quickly as possible, and I think that will work to the advantage of the Government as well as the defendants" (R. 155).

From March 4 to March 23 the Government presented its case (R. 116). During the fourteen trial days the Government offered over 1,500 exhibits, of which over 1,000 were received in evidence, and called over 65 witnesses (R. 9-18). During the course of the trial the court was called upon to make hundreds of rulings on evidence.

BLEED THROUGH

BLURRED COPY

After the Government rested, each defendant moved for dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on the ground that the Government had shown no right to relief (R. 66-79). In opposing these motions, the Government contended that the court was precluded from weighing the evidence, and merely had the duty of determining whether or not the evidence considered in a light most favorable to the Government made out a *prima facie* case (R. 83-84). The district court rejected this contention, and concluded that, as trier of fact, it was under an affirmative duty to review and weigh all the evidence presented by plaintiff, and, upon the basis of that review, to determine whether or not the evidence warranted the relief sought in the complaint (R. 84, 123). The Government does not challenge this interpretation of Rule 41 (b).

After extensive argument and after weighing all of the evidence in the voluminous record, the court found that the Government's evidence failed to establish the existence of a conspiracy (Fdgs. 26, 32, 33, 34; R. 120-121). None of the findings of fact or conclusions of law is attacked by the Government (Br. 8).

On March 30, 1953, the trial court delivered a lengthy opinion reviewing the issues and the evidence (R. 80-113). This opinion reviews all of the evidence in the record which tends even in the remotest manner to prove the allegations of the complaint. The trial court expressly stated that it had "deliberately reviewed the record in a manner most favorable to the Government," but it found the Government's case "utterly lacking in substance" (R. 111).

Judge Campbell throughout the trial permitted the Government great latitude in presenting its evidence, and allowed much evidence of questionable competence to be admitted subject to final argument. Nevertheless he expressed his total impression of the Government's case as follows:

"I am convinced that this suit insofar as it charges Sherman Act violations should not have been filed. The Government began its investigation of this phase of the milk industry in Chicago in 1947, and has had six years to gather evidence in support of the charges in its complaint; yet this court now holds, as it must, that such evidence has not been gathered. I have deliberately reviewed the record in a manner most favorable to the Government, and have found its case to be utterly lacking in substance. The Government thought it necessary to subpoena counsel for the Dean Milk Company at an early stage of this trial, and sought the production of material he had prepared for the Dean litigation. This court then had to balance an attorney's right to the privacy of his work product against the right of the Government to amass evidence for trial. This was an unpleasant dispute, and a dispute which should not have been presented to this court. It is also apparent that a portion of the Government's evidence was scraped together during the trial. Many of the Government's witnesses were contacted and interviewed after the trial had begun, and some of them offered no relevant testimony whatever during examination. These factors leave little room for doubt, at least in the mind of the court, as to the quantum of evidence in the hands of the Government at the time this complaint was filed" (R. 111).

The section of the Government's brief entitled "The Government's Evidence" (Br. 8) contains selected excerpts and partial quotations of the trial court's extensive review of the evidence, which review included all of the isolated pieces of evidence most strongly supporting the Government's allegations. Since the findings are not in issue, and since only a small portion of the entire trial record is before this Court, it is manifestly inappropriate to attempt to burden this Court with a description of all the details of the evidence; and we shall not lengthen this statement by an analysis of the many items which contradict, dis-

BLEED THROUGH

BLURRED COPY

prove or explain the various selected excerpts identified in the Government's brief. The discussion which follows is confined to a description of the facts which will enable this Court to understand the trial setting of the rulings which are challenged on this appeal.

I.

The Three Evidentiary Rulings Attacked by the Government.

A. The Eggleston Deposition.

H. C. Eggleston was employed by Bowman for approximately thirty-five years (R. 170, 171). He was promoted from sales supervisor to Sales Manager prior to February 25, 1941 (R. 171, 172, 184, 257, 259, 332, 336). He left Bowman's employ on June 1, 1943 (R. 171, 172, 269).

Shortly thereafter, he obtained the Chicago franchise for the Dr. Pepper Bottling Company (R. 334). In January, 1951 a Government attorney questioned him about the soft-drink bottling industry (R. 329, 333). A possible civil action by the Chicago Dr. Pepper Bottling Company against the Coca Cola Company for alleged violations of the antitrust laws was discussed (R. 329, 334).

On January 25, 1951 Thomas McConnell, a Chicago lawyer, filed a treble damage suit against the Coca Cola Company on behalf of the Chicago Dr. Pepper Bottling Company (R. 328).

On January 29, 1951 Eggleston signed a nine-page affidavit prepared by McConnell for use in *Dean Milk Co.* v. *American Processing and Sales Co.*, N. D. Ill. E. D., No. 49-C-1159[3] (R. 158, 341), in which McConnell was attorney

3. The complaint in that case alleges that Bowman and Borden, among others, were engaged in a conspiracy in violation of Sections 1 and 2 of the Sherman Act and were violating Section 2 (a) of the Clayton Act. It sought damages and equitable relief. Beloit was not a party to that case.

for the plaintiff (R. 134). This affidavit was subpoen
by the Government in the instant case (R. 158, 170), mar
as Exhibit 45 for identification (R. 198) and used ex
sively in an effort to impeach Eggleston's trial testim
(R. 198, 205, 209, 217, 219, 220, 336, 337, 340). It was
scribed by McConnell as a statement of what Eggles
was to testify to in the *Dean* case (R. 169).

McConnell took Eggleston's deposition in the *Dean* c
on March 23, 1951 (R. 158), during which McConnell
terrogated Eggleston about copies of numerous minute
meetings held by the Sales Committee of Bowman wh
were in Eggleston's possession (R. 183, 184). They w
all turned over to the Government in the instant case p
suant to subpoena (R. 158, 170). Many were offered
the Government and received in evidence (R. 96-102); t
were used extensively in the examination of Eggles
(R. 180-182, 187, 190-192, 225, 228, 229, 235, 237, 241,
252, 253, 257-262, 264, 265, 267, 268, 276, 279, 305, 308,
314, 316).

Eggleston was on the witness stand for three t
days (R. 170, 204, 227, 270, 304). His testimony c
prises about half of the printed record on this appeal
170-345). Judge Campbell appraised Eggleston as "o
all, a truthful witness" (R. 95).

The fifty-odd depositions taken by plaintiff in the *D*
case, including the Eggleston deposition, were filed w
the clerk of the district court under seal. On Decembe
1952 a decree was entered in the *Dean* case pursuant
the terms of a stipulation between the parties (R. 122).
January 23, 1953, on the application of a Government
torney, Judge Igoe, presiding in the *Dean* case, ente
an *ex parte* order granting leave to the Government
torney to withdraw for five days the depositions of fo
teen witnesses in the *Dean* case, including the Eggles
deposition (R. 133). None of the parties to the *Dean* c

BLEED THROUGH

BLURRED COPY

received notice of the application for this order or of its entry.

On January 28, 1953, after notice, a Government attorney filed a motion in the *Dean* case for an order authorizing the clerk of court to unseal and open all of the depositions which were sealed and on file in that case (App. 59). After a full hearing on February 10, 1953, Judge Igoe entered an order denying the Government access to these depositions. After explaining that his ruling[4] was, in part, based on the fact that the parties had reason to believe that "the matters revealed in those depositions were protected under the seal of this Court," Judge Igoe stated:

> "I will say this. If Judge Compbell wants the depositions, all he has to do is send an appropriate order down here, and we will recognize it, and he can take the depositions up there and rule on it as he sees fit" (R. 161).

The Government at no time prior to the commencement of the trial and at no time during the extensive pretrial conference, made any application to Judge Campbell for an order requesting access to the depositions.

The matter was first presented to Judge Campbell on March 5, 1953, when McConnell responded to a subpoena

---

4. "I don't think that it is at all unreasonable to say that at the time the decree was consented to by the defendants, they must have had in mind that the secrecy surrounding these depositions would be protected, and the seal under which they were sealed in this Courthouse would not be violated.

"Now that decree has been entered, as I say, and the judgment has also been entered. The matters have been concluded. To me it seems kind of unreasonable to say that after all that has been gone through, when and after, no doubt, the defendants have considered *that the matters revealed in those depositions were protected under the seal of this Court*, that after all that has been concluded, then some outsider might come in here and say, Well, we want that seal broken, and we want revealed everything that is contained in those depositions.

"That is the sort of procedure that does not appeal to me • • •" (R. 160-161).

duces tecum commanding him to produce either the original or a copy of the Eggleston deposition (R. 158). McConnell produced his office copy (R. 159). The defendants objected to its production on the ground that Judge Igoe had previously ruled that the deposition was protected under seal (R. 158-159). In an extended argument, the Government asserted that it had a right to obtain a copy of the deposition, even though the original was sealed, because "the sovereign state of the United States has a right to procure its evidence wherever it can" (R. 162). Judge Campbell sustained the defendants' objections (R. 163). The Government does not now challenge the propriety of either Judge Igoe's ruling, or of this ruling by Judge Campbell.

Subsequent to this ruling by Judge Campbell, McConnell conferred with his client, the Dean Milk Company, and with counsel for the Government and decided that he would cause the Eggleston deposition to be physically opened[5] (R. 189).

On March 5, 1953 a Government attorney obtained from the clerk of court twelve *Dean* case depositions, including Eggleston's (R. 132), by using the *ex parte* order entered by Judge Igoe on January 23, 1953, even though it had been superseded by the contrary ruling on February 10, 1953 (R. 129).

On the following day, while Eggleston was on the witness stand, Government counsel informed the court that he was in possession of the Eggleston deposition (R. 185). When the defendants objected to his possession, Judge

5. Rule 14 of the Rules of Court for the Northern District of Illinois provides as follows: "*Unless otherwise ordered by this court*, the clerk shall, upon request of a party or his attorney, open any deposition filed in this court, first endorsing on the back thereof at the time of opening the name of the party or attorney at whose instance the deposition is opened."

BLEED THROUGH

BLURRED COPY

Campbell stated "as far as it being in his possession, I don't propose to go into it. Insofar as he is going to use it in asking any questions here, I certainly am going into it. Thus far there is nothing before me. Apparently, there are various ways of getting many things around here" (R. 185).

Thereafter, Government counsel offered to prove that McConnell had directed that the Eggleston deposition be opened (R. 189). The court then stated "I then take it that McConnell and his client the Dean Milk Company, have overruled this court and Judge Igoe" (R. 189). He further commented that he thought "the matter should be referred to Judge Igoe for whatever action he cares to take in the nature of a complaint for contempt" and refused to hear further argument (R. 189).

On March 9, 1953, while the Government was still presenting its evidence, defendants, upon notice both to Government counsel and to the other parties in the *Dean* case, moved before Judge Igoe that the deposition be resealed (App. 62). Thereupon Government counsel filed a motion in the *Dean* case asking that the motion to reseal be continued until after the trial in the present case was concluded (App. 62). The motion to reseal was thereupon continued until April 10, 1953, after termination of the trial below. It was then granted as to all the depositions except Eggleston's, which was withheld pending an investigation by the Department of Justice (R. 137-8).

A written offer of proof, based upon isolated passages taken from the deposition, was filed with Judge Campbell and denied before the conclusion of the Government's case (R. 52-64). Judge Igoe's refusal to reseal the Eggleston deposition, the Government's offer of proof with respect to the Eggleston deposition, and the contentions of the Government with respect to the entire matter were pre-

sented to Judge Campbell at the time of the Government's motion for a new trial (R. 129-149). The motion for a new trial was denied (R. 151, 152).

As is pointed out at pages 25 through 28, *infra*, the Government's offer of proof does not in fact impeach Eggleston's testimony with respect to any one of the six so-called "principal conflicts" asserted and relied on by the Government.

B. The Newey Tape Recordings.

McConnell, counsel for Dean Milk Company in the *Dean* case, employed Paul Newey to assist him in that litigation[6] (R. 168, 371). Newey, posing as "Paul Mutzi", and pretending to be the owner of a grocery store, telephoned various dairies and suggested that he might wish to change milk suppliers (R. 371-373, 400). When dairy salesmen called on him, he led them into conversations which he recorded through a concealed microphone (R. 373). These tape recordings were later transcribed (R. 405). He did not have conversations with salesmen from Bowman, Beloit, Belmont, or Ridgeview, but testified that he had one with a Borden salesman (R. 382), whom he failed to identify in court (R. 409).

Judge Igoe, on April 25, 1952, denied motions of the *Dean* case defendants for production of these recordings, holding them to be the work product of McConnell (R. 165-168). McConnell asserted the same right in the present case when the Government sought to subpoena the recordings and transcripts from him (R. 164-167). When the Government stated that it only wanted them to substantiate

6. Newey was a lawyer who had brought an antitrust case against Bowman and Beloit. Before filing that suit, Newey had consulted McConnell as the result of a conversation with an attorney in the local antitrust division of the Department of Justice (R. 401-403).

BLEED THROUGH

BLURRED COPY

Newey, who was being called as a friendly witness (R. 167), Judge Campbell sustained McConnell's objection (R. 169). The Government complains of this ruling.

Later McConnell wrote Newey that he was turning over the transcripts and tapes to Newey to refresh the latter's recollection, and added that "if the Court sees fit to require you to do so you may submit the tape recordings and the transcripts thereof to the defendants in the case as well as to the Government for their use in the case" (R. 148-149). Government counsel thereupon (the day before Newey testified) requested permission to set up the necessary sound equipment in the courtroom to play the recordings (R. 368), and showed the court McConnell's letter to Newey (R. 369).

Judge Campbell interpreted the letter merely as an authorization to Newey to use the material to refresh his recollection (R. 369). The Government did not object to this interpretation, nor produce McConnell to show a different meaning (R. 369). The court then stated that "the ruling made at the time Mr. McConnell asked for it still stands" (R. 369).

The record shows that, during the course of the trial, the tapes and transcripts were voluntarily turned over to Government counsel (R. 144). At no time—even when Newey's inability to remember his conversations was obvious—did the Government offer in evidence the tape recordings or the transcripts, or make an offer of proof as to what they would show.

C. The Conversation Between Moser and a Deceased Borden Agent.

The third ruling of the court attacked by the Government relates to the testimony of Hans Moser, vice president of a non-defendant dairy (R. 104, 351-352). Moser was asked to repeat a 1943 conversation he had with Baril, a deceased agent of Borden (R. 351). The court sustained an objection to the question (R. 352). The Government then offered to prove: that in July, 1943, Moser bid for and received the milk business of Navy Pier, Chicago; that in a conversation Baril referred to the Navy Pier as Borden business and asked why Moser had bid on it; that Moser explained that he had to show some Government business in order to get a wartime priority on machinery; that Baril replied that Borden would have to get some of Moser's store accounts to offset the business it lost; and that Moser never again bid at Navy Pier and did not lose any store accounts to Borden (R. 65).

II.

The Ruling on the Clayton Act Issues.

The complaint alleged that since January, 1941, each defendant had been selling fluid milk to wholesale purchasers in the Chicago area at discriminatory prices in violation of Section 2(a) of the Clayton Act (R. 37-38). It expressly alleged that the defendants "will continue the aforesaid offenses unless the relief hereinafter prayed for is granted" (R. 38).

The trial court stated that Bowman and Borden each had, in past years, in some instances discriminated among its purchasers, although the evidence relative to such discriminations was conflicting, and there was much material

BLEED THROUGH

BLURRED COPY

in the record showing that affirmative defenses were available (R. 108).[7]

However, the trial court found, that insofar as the Clayton Act was concerned, Bowman, Borden, Ridgeview and Belmont were already effectively enjoined from performing any of the acts set forth in the Government's prayer for injunctive relief (R. 123). Section VII of the decree entered by Judge Igoe of the same court on December 3, 1952 in the *Dean* case expressly prohibited Bowman and Borden and their subsidiaries, Ridgeview and Belmont, from engaging in any of the discriminatory practices shown by the evidence (R. 109-111). Accordingly, the court concluded that "since the violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations, and since the *Dean* decree assures that there will be no new violations, this court shall not grant the injunctive relief sought by plaintiff under Section 2(a) of the Clayton Act" (R. 125).

In his memorandum and order, Judge Campbell stated:

> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the *Dean* decree assures, as completely as any decree can assure, that there will be no new violations." (R. 111.)

The record contains no evidence of any violation of the Clayton Act by any of the appellees either since the entry of the *Dean* decree on December 3, 1952, or during a period of several years preceding the entry of that decree.

---

7. The court expressly found that there was no evidence of any violation by Beloit.

SUMMARY OF ARGUMENT.

I.

Each of the three challenged evidentiary rulings was proper. Moreover, they did not affect the outcome of the litigation.

A. The limitations imposed by the trial court on the latitude to be allowed Government counsel in attempting to impeach its own witness were clearly proper and did not prejudice the Government's presentation in the slightest. In ruling on the Government's motion for a new trial, the trier of fact had before it all of the facts and arguments presented to this Court in addition to its intimate knowledge of the entire trial record and determined at that time that no useful purpose would be served by reopening the proofs. Eggleston's deposition does not in fact impeach his trial testimony; even if that testimony were deleted from the record, the Government's affirmative case would still be "utterly lacking in substance."

B. With respect to Newey, the Government merely attacks a ruling (and also the refusal to change that ruling) which denied the Government power to compel McConnell to surrender physical possession of certain tapes and transcripts. Subsequent to the court's ruling the tapes and transcripts were voluntarily turned over to the Government. Accordingly, the court's ruling had no effect whatever on the Government's opportunity to present its case. Despite the fact that the Government acquired possession of the material which the trial court refused to subpoena, neither the tapes nor the transcripts were offered in evidence, and no offer of proof was made with respect to any of this material. Furthermore, the court was correct in sustaining McConnell's objection to surrendering the tapes and transcripts, and the record conclusively shows

BLEED THROUGH

BLURRED COPY

that this evidence would have had little or no probative value.

C. It was not error for the trial court to exclude testimony describing an ambiguous and irrelevant conversation between a deceased employee of a defendant and an executive of a non-defendant occurring more than a decade before the witness took the stand since it is well settled under the applicable Illinois authorities that such testimony is entitled to little or no probative value and is, in the circumstances of this case, plainly immaterial.

II.

The record does not establish that the Government is entitled to any equitable relief against recurrent violations of Section 2(a) of the Clayton Act. The evidence of violations of that statute in past years was plainly insufficient to require the chancellor to exercise his discretion to grant injunctive relief. This is particularly plain since the trial court expressly found that the defendants were already effectively enjoined from performing any of the acts described in the Clayton Act portions of the Government complaint.

ARGUMENT.

I.

THE DISTRICT COURT'S RULINGS ON EVIDENCE WERE ENTIRELY PROPER AND DID NOT SUBSTANTIALLY AFFECT THE RIGHTS OF THE PARTIES.

Before demonstrating that each of the three challenged evidentiary rulings was clearly correct, we shall comment briefly on all three rulings.

Despite the fact that the pretrial conference took three weeks and the trial an equal length of time, despite the fact that the Government had been preparing its case for at least six years, despite the fact that the Government called 65 witnesses and offered over 1,500 exhibits (most of them obtained from the files of the defendants), the Government failed to prove its case.

Despite the fact that the trial court permitted the introduction of evidence which was never tied up to the charges made, despite the fact that the bulk of the rulings were favorable to the Government, the Government now asserts that it was prejudiced because of three among the hundreds of rulings on evidence made in the course of trial.

Despite the fact that it had the aid of grand jury subpoenas and grand jury evidence, despite the fact that it had the services of the Federal Bureau of Investigation, despite the fact that it had years in which to take the depositions of witnesses, the Government complains primarily because it was not permitted to supply deficiencies in its own evidence by using depositions and tape recordings, admissible only for limited purposes at best, and obtained by an attorney in private practice in the course of private litigation.

BLEED THROUGH

BLURRED COPY

The trial judge's rulings on *evidentiary* matters and on questions as to which he has discretion should be appraised on appeal in the perspective of the whole record. Even if error on such matters be committed, the judgment should not be reversed unless the appellant demonstrates that its "substantial rights" have been affected.[8] As a consequence it is not necessary for the trial judge to state all of the reasons, or indeed any reason whatever for a ruling on evidence if in fact that ruling is proper.[9]

In its effort to demonstrate that the three challenged evidentiary rulings had a substantial effect on the outcome of the litigation, the Government has asked this Court to view the effect of the three rulings "collectively" (Br. 32). This request is a recognition of the plain fact that none of the three rulings in itself conceivably constitutes reversible error. Thus the Government has, in effect, acknowledged that the judgment must be affirmed unless all three of the rulings were in cumulative effect a denial of substantial rights to the Government.

When the three rulings are considered in connection with the numerous other rulings on evidence made during

---

8. 28 U. S. C. Sec. 2111 reads as follows: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61 of the Federal Rules of Civil Procedure reads as follows: "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

9. *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937); *Silsby et al.* v. *Foote*, 14 How. 218 (1852); *Navajo Freight Lines* v. *Mahaffy*, 174 F. 2d 305 (10th Cir. 1949).

the course of the trial, we firmly believe that the trial court erred on the side of the Government in receiving a substantial volume of technically inadmissible evidence.[10] The court justified the reception of such evidence on the ground that the case was being tried without a jury, and many arguments which would normally go to admissibility could be directed at the weight of the evidence.[11]

The defendants could not successfully contend that this procedure, in a trial without a jury, substantially affected their rights. It is equally plain that the evidentiary rulings challenged by the Government had no actual effect on the outcome of the case—particularly since the trier of fact had full opportunity to study the Government's offers of proof.

The three rulings which are challenged will be discussed in the order presented by the Government.

---

10. Early in the trial the judge stated: "We have no jury here, and it is my thought that insofar as any materiality is shown at all, that I would allow evidence to go in * * *" (R. 155). This attitude was maintained throughout the trial.

11. For example, the court could properly have sustained the objection to Heinz' testimony describing a statement supposedly made by Eggleston in 1945 (R. 366). This testimony was plainly objectionable as hearsay and not an admission of an adverse party since Eggleston had not been an employee of Bowman since 1943 (R. 171-172). Nevertheless, the court admitted the evidence with the comment that counsel could argue against its weight later (R. 366).

BLEED THROUGH

BLURRED COPY

A. It Was Not Error for the District Court to Limit the Government's Opportunity to Attempt to Impeach the Witness Eggleston by Refusing Counsel Permission to Use a Copy of a Deposition Which Had Been Filed Under Seal in Another Proceeding.

Prior to the trial Eggleston testified before the grand jury on two separate occasions (R. 162). He was also interviewed by three Government attorneys several different times (R. 162, 177, 179, 270, 271, 333, 334). He had signed a nine-page affidavit prepared by McConnell covering the testimony he was expected to give in the *Dean* case (R. 158, 169, 170), and this was placed in the hands of the Government (R. 158, 169, 170). He had taken with him when he left Bowman a large number of sales committee minutes which were also put in the hands of the Government (R. 157, 158, 170). The Government did not take Eggleston's deposition (R. 162). It made no use of his grand jury testimony, although the grand jury transcript was available to the Government; none of the Government attorneys who had interviewed Eggleston was called as a witness, even though Eggleston characterized one of their statements as "an absolute falsehood" (R. 274).

Despite all this, Government counsel now assert that they lost their case because they were not able to use Eggleston's *Dean* case deposition for additional impeachment of this witness.

There are six essential links in the Government's argument that the district court committed prejudicial error in refusing to permit use of the Eggleston *Dean* case deposition for impeachment purposes. If any one of the links in the chain is broken, the Government's argument must fail.

Ultimately, the Government must satisfy the Court that the trial court committed error which affected the sub-

stantial rights of the parties. The Government must sho
a substantial probability that the trial court would hav
reached a different conclusion on the merits, if it had pe
mitted the Eggleston deposition to be used at the trial.

In its attempt to persuade this Court to reach that ul
mate conclusion, the Government has been forced to re
ognize that the mere failure to impeach its own witness
not enough. Therefore the Government is compelled
assert that by its failure to impeach Eggleston, it was d
prived of the full benefit of the testimony of another wi
ness, Heinz. Thus the Government must argue as follows

First, that if the trial court had believed the witne
Heinz, it would not have dismissed the complaint on th
merits;

Second, that the trial court would not have discounte
the testimony of the witness Heinz if it had not found tha
Eggleston was "over all, a truthful witness";

Third, that the trial court would not have considere
Eggleston as, on the whole, a truthful witness, if the Gov
ernment had been permitted to attempt to impeach hi
with his prior deposition;

Fourth, that without use of the Eggleston deposition i
was impossible for Government counsel to cross-examin
Eggleston effectively;

Fifth, that it was error for the trial court to hold o
March 6, 1953, that the deposition was not available to th
Government on the ground that it was protected by th
seal of court;

Sixth, that there are no alternative grounds to sup
port the trial court's ruling.

We shall demonstrate that the Government's position i
untenable with respect to every one of these six essentia
links in its argument.

BLEED THROUGH

BLURRED COPY

1. The Testimony of the Witness Heinz Certainly Was Not Vital Evidence.

After summarizing the Heinz testimony in his opinion, Judge Campbell concluded:

> "It should be noted also that here, again, the Government offers evidence of alleged meetings which took place over twelve years ago between two of ten alleged conspirators" (R. 95).

Plainly, even if he had accepted the Heinz testimony at face value, Judge Campbell would not have reached a different conclusion on the merits.[12]

2. The Trial Court Had Several Adequate Reasons for Discounting the Testimony of the Witness Heinz, Entirely Apart from the Testimony of Eggleston.

Since the deposition of Eggleston was offered solely for impeachment purposes,[13] and obviously could not in consequence have been used as affirmative evidence,[14] the most that the Government could possibly have achieved by the use of the deposition would have been to persuade the

---

12. Heinz testified to certain meetings with an employee of Borden and also that Eggleston told him that "they were getting their fair share of the business" at Great Lakes (R. 362), and that Great Lakes and Fort Sheridan were being "shared on an alternate basis with Borden Dairy Company" in 1942 (R. 361). Heinz did not testify that Eggleston said (as the Government implies) that Bowman was getting an allocated share of this business because of an agreement with Borden. Ambiguous evidence, even if distorted, hardly justifies a finding of conspiracy.

13. The Government offer of proof concludes as follows: "That if after hearing said questions and answers read, the witness H. C. Eggleston denies having made them, the Government will claim the witness' oral testimony given in this cause wherever contrary to the testimony in said deposition, has been and is impeached." (R. 64.)

14. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234 (1940); *Southern Ry.* v. *Gray*, 241 U. S. 333, 337 (1916).

trial court to disregard Eggleston entirely. Even if it be assumed for the sake of argument that Eggleston should be ignored completely, it is still clear that the Heinz testimony was not credible.

Judge Campbell expressly identified three independent reasons for discounting Heinz. He pointed out that he had been unable to view Heinz on the witness stand, and also that there was nothing in the record to corroborate his testimony (R. 95). During the reading of the deposition the court also noted that Heinz' testimony about a conversation with Eggleston two years after he had left the company was an inaccuracy going to the weight of his testimony (R. 366).

Judge Campbell was doubtless aware of many other discrepancies in Heinz' testimony. For example, Heinz said that his conversation with Eggleston about the Great Lakes business—about which the Government argues at length—took place in 1942; but he also stated that Eggleston then was a sales supervisor. The documentary evidence discloses that this must have been taken place prior to February 25, 1941.[15] In view of the crucial importance of the 1940 cut-off date, Heinz' repeated uncertainty as to the time of the conversations about which he testified affords an added reason for discounting his testimony.[16]

---

15. Eggleston had been promoted to Sales Manager prior to the date of the earliest Sales Committee Meeting Minute found in the record (R. 172, 184). The earliest minute introduced by the Government was dated March 18, 1941 (R. 257), and a minute dated February 25, 1941 was marked as defendant's exhibit 1 for identification (R. 332). Moreover, Heinz was not confused as to Eggleston's title because he described the differences between the duties of a sales supervisor, who was an immediate superior to a branch manager, and the duties of the Sales Manager who had general supervision of fluid milk sales (R. 363).

16. Consider, for example, the following interrogation of Heinz by Government counsel:

"Q. Can you tell us something of the date of that conversation with respect to the date of the document?

BLEED THROUGH

BLURRED COPY

3. The Deposition Would Not Have Impeached Eggleston's Trial Testimony.

We assume that Government counsel, in preparing their offer of proof, selected from the extensive deposition given by Eggleston in the *Dean* case all of the points of supposed discrepancy with his trial testimony. We assume also, that Government counsel, in selecting six of these supposed inconsistencies for argument (Br. 18-20), picked the ones most favorable to their argument.

The pertinent principles of law are so well settled as to require little discussion. Of course, "impeachment by contradictory statements must be upon a material matter," *American Ins. Union* v. *Lowry*, 62 F. 2d 209, 212 (5th Cir. 1932), *cert. den.* 298 U. S. 745; *cf. People* v. *Pfanschmidt*, 262 Ill. 411 (1914); *Prather* v. *Chicago Southern R. R. Co.*, 221 Ill. 190 (1906); the statements must be clearly inconsistent, *Clemens* v. *Kaiser*, 211 Ill. 460, 467 (1904); and the scope of attempted impeachment may be limited in the discretion of the trial court.

> "These assaults and counter assaults upon the witnesses and parties concerning matters which are material only as affecting their credibility must end somewhere, and the court did not abuse its discretion in refusing to open the door any wider. Indeed, if we were to hold that the court erred in this ruling, we should not regard the error of a character to require a reversal of the case." *Dugger* v. *Kelly*, 168 Iowa 129, 139 (1914).

---

16. *Continued*—

A. It would be prior to this time.
Q. Prior to August 3?
A. Yes.
Q. 1942?
A. Yes, sir.
Q. About how long prior?
A. I couldn't say, sir" (R. 361).

Furthermore, the trier of the facts cannot disregard the testimony of a witness shown to have made inconsistent statements at another time unless he believes that the witness has *wilfully* sworn falsely in testifying to a material matter.

> "Where a witness is contradicted as to a material matter, or evidence is offered showing that he has made statements at another time inconsistent with his testimony as to a material matter, he is not thereby impeached, according to the more restricted significance of the word, unless the jury believe from the contradiction, or from the proof of inconsistent statements made at another time, that he has *wilfully* sworn falsely as to the material matter * * * to which it is charged he has made inconsistent statements at another time." *Chicago City Ry. Co.* v. *Ryan*, 225 Ill. 287, 289-290 (1907).

Minor inconsistencies, such as a shift of emphasis or a natural difference in recollection at different times, do not constitute impeachment.

The fallacies in the Government's repeated assertions that Eggleston's deposition impeached his trial testimony can be easily demonstrated by considering the six so-called "principal conflicts" in the order listed in the Government's brief.

(a) The Government states that Eggleston testified that Bowman did "very little" "stop buying" prior to June of 1943 (Br. 18). The Government explains that "stop buying" is the practice of "offering of cash and other gratuities to induce stores to *change* suppliers" (Br. 18). This is said to be inconsistent with testimony at the deposition that "stop buying" payments were "running maybe 100,000, 150,000 a year" at that time. In fact, however, this deposition testimony does not refer to "stop buying"—indeed, does not even mention "stop buying"—but on the contrary relates to discounts and allowances to "grocery

BLEED THROUGH

BLURRED COPY

tore people" pursuant to "instructions not to *lose* any business to the Dean Milk Company" (R. 54).

(b) Eggleston testified that he "had nothing to do with he financial statements" and hence did not know whether Ridgeview "operated at a loss" (R. 200). On his deposition, he expressed the opinion that Ridgeview was "not operated at a profit" while he was with Bowman and that "if anybody" absorbed the loss, Bowman did (R. 57). To express such an opinion on a deposition does not contradict a salesman's cautious statement on the witness stand that he did not really "know" the answer to a purely financial question.

(c) Eggleston's repeated denials at the trial of any agreement with Borden to share the Great Lakes business after 1940, although "prior to 1940 it was something else" (R. 180), are obviously not impeached by his deposition response to the question whether he had "ever" had any such agreement (R. 61). Indeed, the trial court would not have permitted Government counsel even to ask this question since it was not limited to the period between 1940 and 1943. Counsel were consistently required to limit questions of this nature to the period after the cut-off date.[17]

(d) Similarly, the trial testimony that Eggleston had nothing to do with school bids after 1940, although he did "way back before 1940" (R. 336) is certainly not impeached by his deposition answers to general questions not limited as to time or place. Indeed, counsel again would not have been permitted to ask the witness such questions even if the deposition had been available.

(e) The fifth alleged inconsistency starts with Eggleston's trial testimony that "at no time did *we* go below their prices" (R. 217). The Government claims (Br. 19-

17. Government counsel as well as defense counsel objected to questioning Eggleston about activities prior to September 16, 1940 (See *e.g.* R. 319).

20) that this is contradicted by his deposition statement that "*we* sold milk as low as five cents a quart off the Ridgeview trucks" (R. 59) and that Hawthorn was forced to meet this price. A reading of Eggleston's trial testimony discloses that he was using the pronoun "*we*" to refer primarily to *Bowman*, rather than to *Ridgeview*, which was under the supervision of Mr. Peck in 1940-43 (R. 217). In asserting that "at no time did *we* go below" Hawthorn prices, he probably referred to *Bowman*. On his deposition he had previously explained that "*we* had men follow" Hawthorn trucks and get the names of their customers, but added "*we* turned them over to Ridgeview" (R. 59). Thus the Government's entire argument rests on the assumption, which the context rebuts, that the pronoun "we" in all instances refers both to Bowman and to Ridgeview. Inconsistencies which are predicated on a debatable interpretation of ambiguous statements clearly are not impeaching.

(f) The sixth supposed discrepancy also disappears. There simply is no discrepancy between the trial testimony that Bowman "lost stops to Belmont" (R. 200) and the deposition testimony that Belmont bothered Bowman's accounts "once in a while" (R. 58).[18]

4. Even Without the Deposition Government Counsel Had an Adequate Opportunity to Cross-Examine Eggleston.

Eggleston appeared before the grand jury on two separate occasions, and the transcript of his grand jury testimony was available to the Government (R. 162). He was also interviewed repeatedly by various attorneys in

18. The reference in the deposition to a "general understanding" with Borden is apparently cited by the Government as *affirmative evidence* rather than as impeachment. Such use of the deposition is, of course, plainly improper particularly since at this point the deposition testimony relates to the years "1938 or 1939" (R. 54, 57).

BLEED THROUGH

BLURRED COPY

the Antitrust Division (R. 162, 177, 179, 270, 271, 333, 334). These attorneys were available to testify at the trial, but not one of them took the witness stand. The Government had ample opportunity to take its own deposition of the witness Eggleston, even during the period between Judge Igoe's ruling that the depositions taken in the *Dean* case were not available to the Government and the time that the trial of this case commenced.

In addition to the opportunities to impeach Eggleston which the Government had but did not use, the Government did in fact use materials which duplicated everything of importance in the deposition.

The deposition was taken by McConnell in the *Dean* case after he had prepared a nine-page statement of what Eggleston was going to testify to. This statement was signed by Eggleston, and was obtained by the Government by subpoena. This statement was used extensively by Government counsel (Exhibit 45 for identification)[19] in their unsuccessful efforts at impeachment during the three days Eggleston was on the witness stand. Substantially every detail covered by the Government's offer of proof was also covered by this affidavit.

The same may be said of the voluminous Bowman Sales Committee minutes. These were also used by McConnell as the basis for the deposition given by Eggleston in the *Dean* case and their extensive use by Government counsel at the trial afforded more than a reasonable opportunity to attempt to impeach the witness.

The court viewed the demeanor of Eggleston on the witness stand throughout this extended and intensive adverse[20] examination and concluded that he was "over all, a truthful witness".

---

19. R. 198-200, 205-209, 217, 219, 220, 336, 337, 340.

20. Government counsel was permitted to examine Eggleston as an "adverse" witness, even though his right to do so was doubtful.

5. The Trial Court Properly Held on March 6, 1953, That the Eggleston Deposition Was Not Available to the Government.

Again, it is essential to evaluate the trial court's ruling in the setting in which it was made.

Before the commencement of the pretrial conferences in the instant case, Judge Igoe had entered an order in the *Dean* case denying the Government access to the Eggleston deposition. At the time he entered that order, Judge Igoe stated that if Judge Campbell personally wished to rule on the availability of the various depositions which the Government had tried to obtain, that he (Judge Igoe) would respect his ruling. Judge Campbell interpreted this comment as merely indicating "that if I want to by order personally overrule his respect of the seal in a deposition in his case, I may go ahead and do so, and he will respect that order" (R. 161). It is apparent from Judge Campbell's remarks, that he felt that Judge Igoe's order was proper, but obviously even if he had not agreed with Judge Igoe he would have been reluctant to overrule his respect of the seal.

The right of federal district courts to issue such orders with respect to depositions taken in cases before them "to protect the party or witness from annoyance, embarrassment, or oppression" is expressly conferred by Rule 30(b) of the Federal Rules of Civil Procedure.

Judge Igoe, before whom the *Dean* case was pending, had under this rule the unquestioned power to refuse to permit use of the depositions taken in the *Dean* case in other litigation. Judge Campbell, sitting in the same district, had not only the right but the duty, in comity and respect for Judge Igoe, to protect not only the letter but the apparent purpose of Judge Igoe's order. He had the power, there-

BLEED THROUGH

BLURRED COPY

fore, to issue further orders, applying and amplifying what he conceived Judge Igoe's order to mean.

The Government has at all times conceded that Judge Igoe's order was proper.

Judge Campbell was quite obviously offended by the technical position of Government counsel that although the original of the deposition was under seal, the seal of court did not protect the copy which was in McConnell's possession. This argument was based on the proposition that "the sovereign state of the United States has a right to procure its evidence wherever it can" (R. 162). This argument has also been abandoned by the Government.

On the following day, when Government counsel announced to Judge Campbell that McConnell had taken it upon himself to direct that the seal be broken in order to enable the Government to obtain a copy of the deposition, Judge Campbell suggested that this action was contemptuous of the order previously entered by Judge Igoe (R. 189).

The actions of Government counsel make it plain that they too realized the probability that Judge Igoe would regard this act as inconsistent with his prior order. When the defendants filed a motion to reseal the various depositions which had been obtained by the Government, Government counsel promptly moved for a continuance of the motion to reseal until after the termination of the trial below (App. 62). Thus Government counsel deliberately sought to postpone any ruling by Judge Igoe on the availability of the depositions until after the conclusion of the trial.

Furthermore, it is significant that when Government counsel filed their motion for a new trial, they attempted to justify their action in obtaining the deposition on the basis of an *ex parte* order which Judge Igoe had entered

on January 23, 1953 (R. 133) and which he had reversed, after argument, before the depositions were actually obtained (R. 160, 161).

When Government counsel were themselves anxious to avoid a prompt ruling by Judge Igoe on the question whether the deposition of Eggleston had been properly unsealed before the trial court made its ruling, the Government should not be permitted to take the position that the trial court on March 6, 1953 should have known that Judge Igoe would subsequently rule on April 16, that McConnell's action was "justified". Indeed, it is significant, that Judge Igoe did order all of the other depositions to be resealed.

Instead of doing its best to get "invited error" into the record we submit, that in view of Judge Igoe's order prior to the commencement of the pretrial conferences, Government counsel were under a duty to the trial court to explore the question of the availability of this deposition thoroughly in advance of trial.

6. The Ruling of the Trial Court Was Fully Justified on Independent Grounds.

Even if it be assumed that Judge Campbell should have known on March 6, 1953 that Judge Igoe would subsequently rule that McConnell was "justified" in directing that the deposition be unsealed, nevertheless his refusal to permit the deposition to be used for impeachment purposes was clearly proper on independent grounds. He actually relied on independent grounds when he denied the Government's motion for a new trial. He had by then been informed of Judge Igoe's ruling on the motion to reseal.

The Government had no absolute right to impeach

BLEED THROUGH

BLURRED COPY

Eggleston who had been called as its own witness. In prescribing the scope of examination and cross-examination, Rule 43(b)[21] permits an "unwilling or hostile witness" to be interrogated by leading questions, but extends the right to contradict and impeach one's own witness only when the witness is an "adverse party or an officer, director, or managing agent of a public or private corporation which is an adverse party." Eggleston was not employed by Bowman when testifying, and hence was not subject to impeachment under Rule 43(b).

Nor does Rule 26(d)(1) give the Government any such *right* as the Government suggests (Br. 34). That Rule applies only to the use by a party to an action of depositions taken during the pendency of that action. Eggleston's deposition was never taken by either the Government or any other party to this action and as a result does not come within the terms of Rule 26(d)(1). Whatever right the Government had to impeach Eggleston, its own witness, was based on common law principles.

Generally a party will not be allowed to impeach his own witness. However, when a party is genuinely surprised by harmful testimony, the trial court may in the sound exercise of its discretion allow the party to use prior inconsistent statements by way of impeachment.[22] Even in such cases the prior inconsistent statement can be used

21. Rule 43(b) provides: "A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party, only upon the subject matter of his examination in chief."

22. *St. Clair* v. *U. S.*, 154 U. S. 134 (1894); *DiCarlo* v. *U. S.*, 6 F. 2d 364 (2d Cir. 1925); *Young* v. *U. S.*, 97 F. 2d 200 (5th Cir. 1938); *U. S.* v. *Maggio*, 126 F. 2d 155 (3d Cir. 1942).

only to neutralize the harmful statement and cannot be used to introduce affirmative or substantive evidence.[23]

Since the question whether a party may impeach his own witness is within the trial court's discretion, it necessarily follows that the permissible latitude of such impeachment is also a matter for the trial court's discretion. Assuming that Eggleston's testimony was harmful, statements of Government counsel made before Eggleston was put on the witness stand (R. 162) plainly demonstrate that there was no element of surprise in his testimony. Thus the trial court might properly have denied the Government the right to impeach Eggleston at all. Necessarily it was within the court's discretion to limit the length of the examination for impeachment. A diligent search has failed to reveal a single case in which a trial court has been reversed for limiting the scope of impeachment of a party's own witness.

In view of the extensive examination which was permitted, particularly since Government counsel were in possession not only of the transcript of Eggleston's grand jury testimony and of memoranda of a series of interviews with various Government attorneys, but also of the Sales Committee minutes and the nine-page affidavit which formed the basis for McConnell's examination of Eggleston at his deposition, the trial court certainly had discretion to refuse to allow any more lengthy examination than it did.

Moreover, since the question whether the Eggleston deposition was available to the Government was fully argued before Judge Igoe, was never raised during the lengthy pretrial conferences, and was again fully argued on March 5, 1953, it was certainly reasonable for the trial

23. *Kuhn* v. *U. S.*, 24 F. 2d 910 (9th Cir. 1928); *U. S.* v. *Block*, 88 F. 2d 618 (2d Cir. 1937); *Ellis* v. *U. S.*, 138 F. 2d 612 (8th Cir. 1943).

BLEED THROUGH

BLURRED COPY

judge to refuse to interrupt the trial on March 6 for another extended argument on a question which should properly have been disposed of at an earlier date. The orderly administration of extended antitrust litigation, in accordance with the recommendations of the Judicial Conference of the United States would be substantially impaired if the trial court's eminently reasonable ruling were held by this Court to be error.

B. The Government Has Failed to Show Either Error or Prejudice With Respect to the Ruling That the Government Was Not Entitled to Obtain Possession of the Newey Tape Recordings.

McConnell, attorney for the plaintiff in the *Dean* case, responded in this case to a subpoena requesting him to produce tape recordings made by his associate, Paul Newey, and transcripts thereof (R. 164). He explained to the court that he had had a "bitter argument" with counsel for defendants when they sought in the *Dean* case "to compel me to produce in that case" these same recordings and transcripts; and that a money settlement in the *Dean* case remained unpaid (R. 165). He therefore stated, that he was opposed to having the material "now made public" (R. 165).

The trial court, after being informed by Government counsel that Newey would testify on behalf of the Government, inquired, "Then why do you need these tape recordings?" (R. 166). Counsel replied, "Because we wanted to play them for the Court so the Court could hear them" (R. 166). Later this colloquy occurred:

> "The Court: The only purpose of playing the recordings here then, Mr. Jinkinson, would be to substantiate or support the testimony of the witness Newey?
>
> Mr. Jinkinson: That's right" (R. 167).

Mr. Jinkinson added that Newey was neither adverse n unfriendly (R. 167). Thereupon the trial court pointed o that "There is no question of admissibility about the ta recordings if the testimony would otherwise be admi sible"; that McConnell's position was that he would embarrassed in the further handling of his case if these r cordings became public; and that he thought McConnell position justified (R. 168-9). Hence:

> "I do not sustain the defendants' objection, becau I don't think they are in position to object, but I su tain Mr. McConnell in his position that he is not r quired, in obedience to that subpoena, to turn the tape recordings over to the Government. It is ordered" (R. 169).

The same ruling was extended to the transcripts (R. 169 The sole effect of the court's ruling was to deny the Go ernment *possession* of the tapes and transcripts (R. 169)

Newey was saved by the Government to appear as o of its two final and climactic witnesses. The day before h appearance, Government counsel made this statement:

> "Mr. Jinkinson: Getting back to the Newey prop sition, I have subpoenaed Mr. Newey, and in order refresh his memory, I sent him over to Mr. McCo nell's office to see some tapes that he had, that M McConnell had in court here one day. Mr. Newey h the tapes in his possession.
>
> It is a question of whether or not this court is goi to hear those tapes, and if the Court is going to he them the Government, of course, would like to ha permission from the court to set up in the court roo the necessary equipment so that the tapes can played." (R. 368).

When the court inquired whether McConnell was no waiving his objection (R. 368), Mr. Jinkinson handed t court a letter from McConnell to Newey (R. 369). Th letter refers to Newey's request to use the recordings an

BLEED THROUGH

BLURRED COPY

transcripts "to refresh [his] recollection of the conversations with various solicitors for the above-named dairies" (R. 148). The letter proceeds to say that McConnell had discussed the matter with his client, and that "in their view and in ours, it is of the utmost importance that your credibility as a witness in relation to any of said subject matters must be preserved for the benefit of Dean Milk Company, and under the circumstances we and the company have no objection to your use of the tape recordings and the transcripts thereof for such purposes" (R. 149).

Obviously in recognition of the fact that the use in court of this material to refresh Newey's recollection would subject the witness to cross-examination based upon inspection of such material by opposing counsel, McConnell added:

> "In this regard, if the Court sees fit to require you to do so you may submit the tape recordings and the transcripts thereof to the defendants in the case as well as to the Government for their use in the case" (R. 149).

After reading the letter, Judge Campbell stated that he interpreted it as permitting use of the material solely to refresh Newey's recollection:

> "The Court: There is no use of producing the tape recordings here. If he needs it to refresh his recollection, let him refresh it before he gets on the stand. Has he already done that?
>
> Mr. Jinkinson: He is doing it now" (R. 369).

When defendants' counsel announced they would request the right to see the "documents or material" that the witness used to refresh his recollection, Mr. Jinkinson interposed: "Of course, we violently object" (R. 370). This objection is entirely inconsistent with the implication suggested by the Government's brief that there was an offer of the recordings into evidence. The court sustained Mr. Jinkinson's objection:

> " • • • Any document or other material that he uses while on the stand to refresh his recollection is subject to defense examination, and that rule, of course, I will abide by if he uses any such documents. But what he does before he comes in here to take the stand, either in conference with counsel or otherwise, is pretty largely his own business and theirs. I so rule. Is there anything else?" (R. 370).

To which Mr. Jinkinson replied: "Nothing, Your Honor, that I can think of" (R. 370). Thus, Government counsel were themselves objecting to making the transcripts or tape recordings public to defense counsel.

Newey took the stand the next day. He had with him in the court room the written transcripts of all the conversations to which he was testifying (R. 376, 410) and, on the insistence of defense counsel, one transcript was marked as Government Exhibit 1153 for identification (R. 376, 380). Prior to taking the stand, he spent four or five hours (R. 410) in the offices of the antitrust division on the fourth floor of the courthouse (R. 409), in making notes from all transcripts. He also used these notes while on the stand to refresh his recollection (R. 408). Several sets of these notes were identified as Government exhibits. He testified that he put in these notes the matters which he thought would help the Government's case (R. 410).

The Government never offered either the transcripts or the recordings in evidence, nor did the Government make any offer of proof with respect to them.

The rulings of which the Government now complains are thus limited to those made *before* Newey took the stand. By these rulings the court did nothing more than refuse to compel McConnell to surrender possession of the tapes or transcripts to the Government.

BLEED THROUGH

BLURRED COPY

1. The Sole Ruling by the Trial Court, Which Merely Refused to Compel McConnell to Surrender Possession of the Recordings and Transcripts, Became Moot When This Material Was Voluntarily Surrendered to Government Counsel.

Since the Government never offered the recordings or transcripts in evidence, and the trial court never "excluded" them, the sole ruling complained of is the failure to compel McConnell to produce them.

But the refusal to compel production, however interpreted, becomes an entirely academic question in light of the fact, *later* revealed, that these materials were actually placed in the hands of Government counsel, were available at trial, and subject to identification as exhibits (R. 143-145). Why ask this Court to rule that the trial court should have compelled McConnell to turn over documents which were later voluntarily turned over to the Government and made available for use at the trial?

The Government nowhere meets the issue arising from the fact that it failed to offer the material, but merely calls attention to the request of counsel "to set up in the court room the necessary equipment so that the tapes can be played" (R. 368; Br. 47). But the refusal of the court to permit the setting up of the equipment in no way prevented the subsequent *offer* of the tapes—or of the transcripts—in evidence.

Particularly is this so in view of the fact that Newey testified that the transcripts of the tape recordings contained everything which appeared in the recordings themselves (R. 405). No machine was necessary in order to make these transcripts comprehensible. Although Newey had these transcripts in the court room (R. 376, 410), they were never offered in evidence.

2. The Government Misconstrues the Question Presented When It Asserts That the Trial Court "Excluded" the Tape Recordings.

The Government's brief thus states the second "Question Presented" (Br. 2):

> "Whether the court erred in holding that tape recordings of statements made by various agents of alleged conspirators, *which the court excluded*, were within the privilege attaching to the 'work product' of an attorney, and that such privilege had not been waived."

Nowhere in the record did the trial court exclude these tape recordings or the transcripts made from them. While refusing to compel McConnell to produce them, the trial court, as we have seen, expressly held that they would be admissible.

When these transcripts were in the court room pursuant to McConnell's letter to Newey, the trial court stated:

> "I think the transcript, from which he constantly read before each statement or two should be identified in the record and given a number" (R. 380).

In other words, instead of *excluding* the transcripts, the trial court was insisting that they be identified preparatory to their introduction in evidence.

The Government constructs its argument on the premise that McConnell waived his privilege (Br. 45-49). Whether he did or did not, the fact is that the Government subsequently had possession of the tapes and transcripts.

The Government refrained from offering them in evidence, for the reason, obvious on a reading of the cross-examination of Newey, that the transcripts did not support the claims of the Government.

BLEED THROUGH

BLURRED COPY

3. Although the Issue Is Moot, the Refusal to Compel McConnell to Produce His Work Product Was Correct, Since the Government Made No Showing of Good Cause for Compelling Its Production.

This Court has said:

> "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted." *Hickman* v. *Taylor*, 329 U. S. 495, 512 (1947).

No attempt was made by counsel to advance "adequate reasons to justify" the proposed invasion of the privacy of McConnell's files. The trial court stated, and Mr. Jinkinson agreed, that the sole purpose of obtaining the recordings and transcripts was to "substantiate or support" the expected testimony of Newey (R. 167). At that time Newey had not testified, and no necessity of substantiation or support was apparent. The trial court based its ruling on this ground:

> "I don't see any reason for requiring him to turn over that or any other portion of his work papers or his preparation for trial on another case" (R. 169).

The trial court was obviously correct; the record does not contain the slightest bit of a showing of cause on the part of the Government.

The Government's brief (Br. 29) suggests that the rule requiring a showing of good cause has no application except in the case of discovery between adverse parties. But the passage quoted above stating the rationale of the *Hickman* decision is not couched in such limiting terms. The burden lies upon *"the one"*—any one—who seeks to in-

vade the privacy of counsel's preparations; the reasons for protecting that privacy stated by this Court apply equally to the invasion of that privacy by a stranger to the litigation. Especially is that so, when, as here, the result of that invasion is to provide opposing counsel with the very information they were denied when seeking it for themselves.

Nor does the type of material here involved change the rule. The *Hickman* case dealt in part with written witness statements comparable to the tape recordings and transcripts. While the *Hickman* case shows that compulsory production of written witness statements is not precluded under all circumstances, it was just this type of material to which this Court applied its caution that the burden of showing just cause lies on the seeker. On the contrary, "mental impressions and memoranda" were not subject to "any showing of necessity" (329 U. S. at 511-512) and hence not subject to compulsory production under any conceivable circumstances.

At the time of the ruling complained of, no showing was made that the Government was seeking facts which were "hidden in an attorney's file" and "essential" to the preparation or presentation of the Government's case. Absent even an attempt to make such a showing, and in the presence of an admission that the purpose was merely cumulative, the trial court's ruling was obviously correct.

4. The Government's Brief Misconstrues the Reason for the Trial Court's Holding That the Testimony of Newey Was "Valueless."

The Government's brief asserts (Br. 22, 23):

> "The court ultimately held, however, that Newey's testimony was 'valueless', because it was not based upon independent recollection, but upon a reading of the transcript and notes made therefrom. * * *"

BLEED THROUGH

BLURRED COPY

The same misstatement of the trial court's holding is repeated later in the brief (Br. 48, 49).

The fact is that the trial court disregarded the testimony, not because it was based upon the transcripts and notes, but because Newey was not truthfully reporting what was actually said in the conversations.

> "I now hold that the testimony [of Newey] is valueless. It consists, for the most part, of a series of *conclusions* by Newey, admittedly extracted from the transcripts of the recordings to suit the government's convenience. I shall therefore completely disregard the testimony of witness Newey" (R. 96).

This finding was made subsequent to the court's observation that:

> "Instead of using the recordings at this trial, the government summoned Newey. * * *" (R. 96).

The fact is that the "*conclusions*" which comprised Newey's testimony were shown on cross-examination to be a completely unreliable statement of what the tape recordings may have shown.

5. In the Absence of an Offer of Proof, the Government Cannot Rely on the Discredited Testimony of Newey to Show That It Was Substantially Prejudiced by the Trial Court's Ruling.

Having made no offer of proof as to what the transcripts showed, the Government now asserts that the discredited "conclusions" of Newey may be used to indicate what the transcripts contain.

The Government's brief (Br. 40, n. 22) asserts that the tapes "set forth conversations between Newey and agents of five of the defendants (Borden, Capitol, Western, Hunding, and Hawthorn) in which each agent told Newey that the dairies had an agreement not to take each

other's wholesale customers." *This statement is not supported by the record.* The contents of these tapes and transcripts are nowhere set forth or described, with the sole exception of the portions of one of them read on the cross-examination of Newey. In this instance, the portions read contradicted the assertions of Newey, and contained no such statements.

The references given in the Government's brief are not to the record, but to a previous portion of the Government's brief (Br. 23-25). These pages purport to summarize what Newey *testified* was said to him by the dairy representatives; but Newey was proved to have a faulty recollection and, so far as read, the transcripts do not substantiate his testimony.

The witness Newey admitted on cross-examination that he picked out the parts of the conversations he thought would help the Government's case. This, of course, means that the remaining portions of the conversations—all of which lasted from thirty-five minutes to an hour—probably contradicted the conspiracy theory.

The cross-examination of Newey showed clearly that his testimony omitted all reference to passages in the transcripts which rebutted the charge of conspiracy. For example, he omitted statements describing one defendant's solicitation of another defendant's business:

> "Q. Now, as a matter of fact, didn't Kost also tell you specifically he had been soliciting Bowman stops? A. No, he didn't.
>
> • • • • •
>
> Q. Now, I call your attention to Page 27, especially at the bottom of the page beginning with the remark that Mr. Kost made:
>
> 'Your deal here, he has got Bowman's, he has had Bowman's all of the time for many, many years.'

BLEED THROUGH

BLURRED COPY

And then at the bottom of the page Mr. Kost went on to explain:

'He is an old gent there. In fact, I tried to get his stop, and he says there is no sense wasting my time, or me wasting your time. He says I am going to have Bowman's in here regardless of what you offer me, or what you are going to do.'

Mr. Kost said that to you, didn't he?

* * * * *

It is in the transcript, isn't it, Mr. Newey? A. Yes" (R. 421, 422).

The cross-examination is replete with examples where Newey misstated not only the words but the purport of the conversations he had with the dairy salesmen. For example, Newey testified on direct examination that Kost, the Hawthorn salesman, told him "there was an agreement between his company and their company [Borden] whereby he could not take the stop." On cross-examination Newey admitted that such a statement had not been made to him, and that he had put in the mouth of Kost merely what in his tortured logic he believed Kost meant, but which was in fact exactly opposite to what Kost said:

"Q. Now, as a matter of fact, he never told you there was an agreement between the companies, did he? A. This was in reference to my first conversation with Mr. Kost?

Q. Your first conversation. And just after you had refreshed your recollection by looking at this transcript, wasn't it? A. Yes, sir.

Q. And there is not any reference on that transcript where he said that he had said that his company had an agreement with anybody, except what you may have put your own interpretation on? A. Let me see.

(Witness refers to document.)

* * * * *

A. On Page 20 here, when I was talking to Mr. Kost about Bowman and Borden, getting something

from Bowman and Borden, I said 'I don't think I could get anywhere, I mean, comparably, by calling Bowman in or Borden, and some of the others.'

And he says, Mr. Kost said, 'Bowman's, Borden's, I will be frank with you, if they spent a dime and they found they let their stops go, you would be surprised how many stops they have lost, they have lost a hundred stops because—'

Then I said, 'But they still have a few, you know. Of course, they have been doing something.'

And he said, 'They have been in business for 75 years. We have only been in business for 10 years, and we are the third largest dairy. I mean, if we stay in business another 10 years, and if we keep on going the way we are going, we would be the largest.

'Take Borden and Bowman stops, you drive along with me any time that you are free to go along with me, and I will show you that, I can prove it to you that I can take 10 stops today from them. I don't know for how long, but I could.'

By that he inferred that he was not taking their stops. There was some kind of a mutual understanding between them whereby he was not taking their stops" (R. 419, 420).

To the contrary, Kost was pointing out how easy it was to obtain Borden and Bowman customers because they had not "spent a dime."

Another illustration of Newey's complete disregard of the truth in reporting these conversations is as follows:

"Q. Now, I call your attention to your testimony at Page 2238 of the record. In response to a question, 'Did he (Kost) name the dairies whose stops could not be taken?' You answered, did you not, 'He named Weiland, he named Bowman, he named Western United, he named Borden's, and he named Beloit.'? A. Yes, sir.

Q. Now, where in your notes, Exhibits 1154—Exhibit 1154, do you find any reference to Beloit? A. On Page 3, where Mr. Kost had told me that Beloit had

BLEED THROUGH

BLURRED COPY

given John of John's Restaurant on Western Avenue, just across from Riverview, $50, and a $300 loan ten years ago.

Q. Is that what recalls to your mind that Mr. Kost said that he couldn't take Beloit stops? A. That is right.

Q. Now, as a matter of fact, that particular instance you have was Kost telling you about a stop he actually took from Beloit, wasn't it? A. I don't recall. I will have to refresh my memory.

Q. All right. Isn't it true that according to the transcript, 1153, Mr. Kost told you, 'I got a place up on Western Avenue right across from River Park, John's. He opened his restaurant just yesterday. I serve his son at 521 Damen Avenue, and his son wouldn't have anybody else but us in there. I have done George a lot of favors, and the father, as I say, I have been trying to get his business for two or three years, and he has Beloit.

'Beloit loaned him 10 years ago $300. They gave him $50 and a $300 loan, and he has never, regardless of what you would offer him, it doesn't mean anything, he still thinks Beloit is the only company on the street.'

Isn't that what Mr. Kost said to you? A. That is right (R. 420, 421).

Even the notes Mr. Newey prepared to use in aid of testifying showed that he departed freely from what was actually said in order to make a case. The following is one instance revealed by cross-examination:

Q. Now, you testified on record 2262, "I then asked him whether or not Belmont was giving any cash allowances to grocers to get the business. He told me they were."

Is that your testimony? A. Yes, that is right (R. 418).

Later he admitted that his notes read:

'Mills said his boss called Belmont, Belmont refused to give the cash money' (R. 419).

In other words, Newey's testimony as to the conversations he had had with the dairy salesmen was as full of untruths as the untruths he told the salesmen.[24]

The argument of the Government is a structure built by piling one unfounded or incorrect assumption upon another: *first,* the unfounded assumption that Newey was discredited for absence of independent recollection; the truth is he was discredited because he did not correctly report what was said to him as recorded in the transcript; *second,* the unfounded and incorrect assumption that what Newey said as to the contents of the recordings was correct; the truth is he misstated the contents of the recordings which may well have been innocuous; *third,* the unfounded assumption that the tape recordings "contained admissions by the defendants that the dairies had an agreement not to take each other's customers" (Br. 48). Absent an offer of proof quoting from the transcripts, the record is devoid of any credible basis for making such an assertion.

Since the Government was in possession of the tapes and recordings it presumably elected to rely solely upon the testimony of the witness Newey. With respect to his testimony, the court found:

> "At the trial, witness Newey was without any apparent present recollection of his conversations with the defendants' representatives. He used notes, assertedly to refresh his recollection, but his testimony

24. Newey admitted he gave a false name, and told the salesmen at least seven other untruths (R. 408). He also admitted in addition to the corrections and explanations he had made of the tapes (R. 405) that it would be perfectly possible to physically edit the tapes by cutting out portions, taping together the two ends and then rerunning a new tape which would show no evidence of such editing (R. 424). Newey further testified that merely by throwing a switch on a tape recorder, one could black out any part of a conversation that was undesirable or could erase any part of it (R. 428).

BLEED THROUGH

BLURRED COPY

appeared to be and was largely a paraphrase of these notes. These notes were not his past recollection recorded, but were made by him shortly before his appearance on the stand from a reading of transcripts of the various tape recordings. One of these transcripts was also used to refresh his memory. The aforementioned notes were admittedly extracted from the transcripts of the tape recordings to suit plaintiff's convenience. The court completely disregards the testimony of witness Newey and holds that his testimony is valueless" (Fdg. 20; R. 118, 119).

The Government never offered in evidence the tapes or the transcripts or made any offer of proof with respect thereto. It has been repeatedly held that a party must make an offer of proof with respect to excluded evidence to preserve the ruling on appeal so the reviewing court is able to determine whether the ruling involved reversible error.[25] This, the Government in the instant situation, completely failed to do.

To sum up: This Court is asked by the Government

25. In *Palmer* v. *Hoffman*, 318 U. S. 109, 116 (1943), this Court said:

"One of respondent's witnesses testified on cross-examination that he had given a signed statement to one of respondent's lawyers. Counsel for petitioners asked to see it. The court ruled that if he called for and inspected the document, the door would be opened for respondent to offer the statement in evidence, in which case the court would admit it. See *Edison Electric Light Co.* v. *United States Electric Light Co.*, 45 F. 55, 59. Counsel for petitioners declined to inspect the statement and took an exception. Petitioners contend that that ruling was reversible error in light of Rule 26 (b) and Rule 34 of the Rules of Civil Procedure. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous."

See also *Herencia* v. *Guzman*, 219 U. S. 44, 46 (1910).

to assume what the trial court found not to be true—that Newey's testimony as to what was said to him was correct. This Court is then asked to assume what the record itself rebuts—that the transcripts and tapes would have confirmed what Newey said. This Court is asked to assume this in the face of an utter failure of the Government either to offer the transcripts or tapes, or to show by an offer of proof that they would substantiate what the discredited Newey had testified. This Court is asked to assume that the Government was hurt by the refusal of the court to help Government counsel get possession of material which they later acquired by other means.

The fact is that, after Newey was cross-examined on the basis of his notes and one of the transcripts, counsel for the Government on redirect (R. 426-428) completely abandoned any effort to use the notes and transcripts to rehabilitate the witness. This Court is entitled to draw the obvious inference.

BLEED THROUGH

BLURRED COPY

C. The Trial Court Properly Excluded the Proffered Evidence of a Single Innocuous Conversation Between a Non-Defendant Dairyman and a Deceased Agent of a Single Defendant Occurring Ten Years Before the Trial.

The third evidentiary ruling complained of by the Government relates to an offer to prove that the witness, Moser, an executive of Lake Valley, a dairy which is not even mentioned in the complaint, had a conversation in 1943 with a deceased Borden agent. There is absolutely nothing in the offer which has any relevance whatever to the charge that Borden was engaged in a conspiracy with the parties named in the complaint or that Borden was violating the Clayton Act, as charged in the complaint.

Even if the offer of proof were material, since it related to a conversation with a dead man which took place over ten years ago, under applicable Illinois authorities the trial court properly refused to consider it.

The rule that such testimony of a conversation with a dead man is of little or no weight is an old and respected rule of Illinois law:

> "Furthermore, the testimony of Maas, given after Grace's death, that such a statement was made by Grace, should be received with caution and it is entitled to little weight." *Chicago Title & Trust Co.* v. *Merchants' Loan & Trust Co.*, 244 Ill. App. 302, 311 (1st Dist., 1927).

The Illinois Supreme Court has adopted with approval the language of this Court on the subject:

> "The Supreme Court of the United States, in *Lea* v. *Polk County Copper Co.*, 62 U. S. 493, observed that 'courts of justice lend a very unwilling ear to statements of what dead men have said.'" *Moreen* v. *Estate of Carlson*, 365 Ill. 482, 489 (1937).

With respect to the statements of dead men, the Illinois

Courts merely apply with greater force the same tests of probative value applied to evidence of verbal admissions generally:

> "As is well said by Greenleaf, in his work on Evidence, Sec. 200: 'With respect to all *verbal* admissions it may be observed that they ought to be *received with great caution*—the evidence consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake: the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say.'" *Bragg* v. *Geddes,* 93 Ill. 39, 60 (1879) (Emphasis in original text).

The mere fact that Section 4 of the Illinois Evidence and Depositions Act (Br. 4) has a narrow application and a more rigorous impact—that of making the witness incompetent—has been seized upon by the Government for the purpose of criticizing the trial court for refusing an offer that on its face (R. 65) has no probative value and could readily have been refused under the authorities cited above.

The trial court was obviously correct in refusing to receive evidence of a conversation with a dead man ten years after the event, especially when the conversation was entirely irrelevant to the issues in the case. How any possible prejudice inured to the Government's case defies rational explanation.

Summary as to Evidentiary Matters.

The Government asks this Court to reverse the considered, thorough, and detailed appraisal of the evidence by the trial court, after a trial lasting three weeks following

BLEED THROUGH

BLURRED COPY

an extensive pretrial proceeding, after the appearance of 65 witnesses and the reception and study of more than a thousand exhibits, because of three rulings on points of evidence.

To state the nature of these rulings is to make clear their propriety. One ruling excluded an ambiguous and irrelevant conversation with a dead man occurring more than ten years before the witness took the stand. Another ruling simply refused to compel an attorney in private litigation to produce his work product to assist the Government in making up the deficiencies in its own case, and was nullified in any event by the subsequent possession of that work product by Government counsel, who, possessing it, and knowing what was in it, made no effort to offer it into evidence or even to make an offer of proof. The third ruling denied an offer of proof to show that in a deposition taken in another case, and under the protection of a court order, a witness called by the Government itself in the present case had made allegedly inconsistent statements which the offer of proof itself showed were not inconsistent and not impeachment.

II.

THE TRIAL COURT PROPERLY DISMISSED THE CLAYTON ACT PORTIONS OF THE COMPLAINT ON THE GROUND THAT THE GOVERNMENT FAILED TO PROVE ANY RIGHT TO INJUNCTIVE RELIEF.

In its complaint the Government alleged that the defendants were violating and will "continue" to violate the Clayton Act unless relief is granted. The Government failed to prove this allegation and the trial court dismissed the complaint pursuant to Rule 41(b). It necessarily held that "upon the facts and the law plaintiff has shown no right to relief."

There is nothing in the record or the Government brief showing that the Government is entitled to injunctive relief against any threatened violations of the Clayton Act. The Government completely failed to prove any discriminatory sales by Beloit. It has introduced *prima facie* evidence of some old violations by Bowman and Borden, but even this "conflicting" evidence shows that affirmative defenses are available to each of the defendants to justify these old violations (R. 108).

The Government's burden on this appeal is to demonstrate that affirmance of the trial court's order dismissing the complaint will result in substantial injustice. Except for the *prima facie* evidence of some old violations, there is nothing in the record to show that the Government has any right to Clayton Act relief. Certainly, the Government has not met its burden of showing that the chancellor abused his discretion in determining that the entry of an injunctive decree would be "a useless task" (R. 111).

The Government has taken the position that as a matter of law it has a *right* to obtain equitable relief against future violations if it proves that a defendant has at some time in the last ten or fifteen years committed some violation of the Clayton Act. This position is never bluntly stated in these words, but, in view of the flimsy nature of its proof, this is the legal position that the Government necessarily must take in urging reversal of the district court.

No litigant has a *right* to injunctive relief merely by showing past violations of a statute. In denying such a claim, this Court has said:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' *Meredith* v. *Winter Haven*, 320 U.S. 228, 235. The his-

BLEED THROUGH

BLURRED COPY

> toric injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944).

The applicability of this basic equitable principle has frequently been recognized in antitrust litigation. That it is within the chancellor's discretion to refuse to grant the Government any relief if none is needed to protect the public interest was recently held by this Court in the *Grant* case.

> "[The Government] must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

In the present case the chancellor found no cognizable danger of current violation of the Clayton Act. There is nothing in the record or the Government brief to indicate that such a "necessary determination" of a "cognizable danger" should have been made by the trial court.

The Government does not attack the express finding that Bowman, Borden, Ridgeview and Belmont are already effectively enjoined by the terms of the *Dean* decree from performing any of the acts set forth in plaintiff's prayer for injunctive relief (Fdg. 38; R. 123).

The Government has not pointed to a single substantial reason to support its charge that the trial court abused its discretion. The repeated assertion that the "need" for a decree has been demonstrated is unsupported by reference to the facts evidencing this supposed "need."

The remaining contentions of the Government largely answer themselves. The fact that the Attorney General may or may not have a duty to seek an injunction whenever he discovers evidence of a violation of the antitrust laws (Br. 52, 53) does not bear in any way on the function of the chancellor. So long as the courts have their independent part to play in the administration of justice, the supposed compulsion upon the executive branch to initiate proceedings does not compel nor even affect the traditional exercise of discretion by the chancellor.

The Government points out that the entry of a decree in an action filed by a private party under Section 16 of the Clayton Act does not terminate the Attorney General's duty to enforce the antitrust laws by proceeding under Section 15. In other words, if the defendants are violating the Clayton Act, the Attorney General may have the duty to institute an appropriate proceeding to enjoin such violations. This he may do without regard for the outcome of the instant case. *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 339-340 (1952). But he must prove "some cognizable danger of recurrent violation" in order to satisfy the court that equitable relief is needed.

The Government also points out that it could not bring contempt proceedings to enforce compliance with the *Dean* decree without first intervening in that action (Br. 53-55). But certainly the burden on the Government of filing a petition for leave to intervene in the *Dean* case does not require the district court to be burdened with the supererogation of a second decree. The fact that the allowance of an intervening petition is a matter of discretion is of no significance. For if in fact the Government could prove some cognizable danger of violation of the decree, the chancellor would certainly allow intervention. A contrary argument assumes that compliance with an injunction issued in private litigation is a matter which concerns the

BLEED THROUGH

BLURRED COPY

private litigant only; it ignores the power and inclination of courts to enforce obedience of their decrees.

Finally, the assertion that the *Dean* decree may become ineffective because the private parties "may seek modifications" has no more support in the record than the asserted "need" for a second decree. The Bowman petition set forth in the Appendix to the Government's brief was an effort to extend the scope of the decree; and the refusal of the trial court to grant this petition[26] to move against additional parties leaves the field open for the Government—thus advised of violations of law—to move in a direction which really may protect the public.

CONCLUSION.

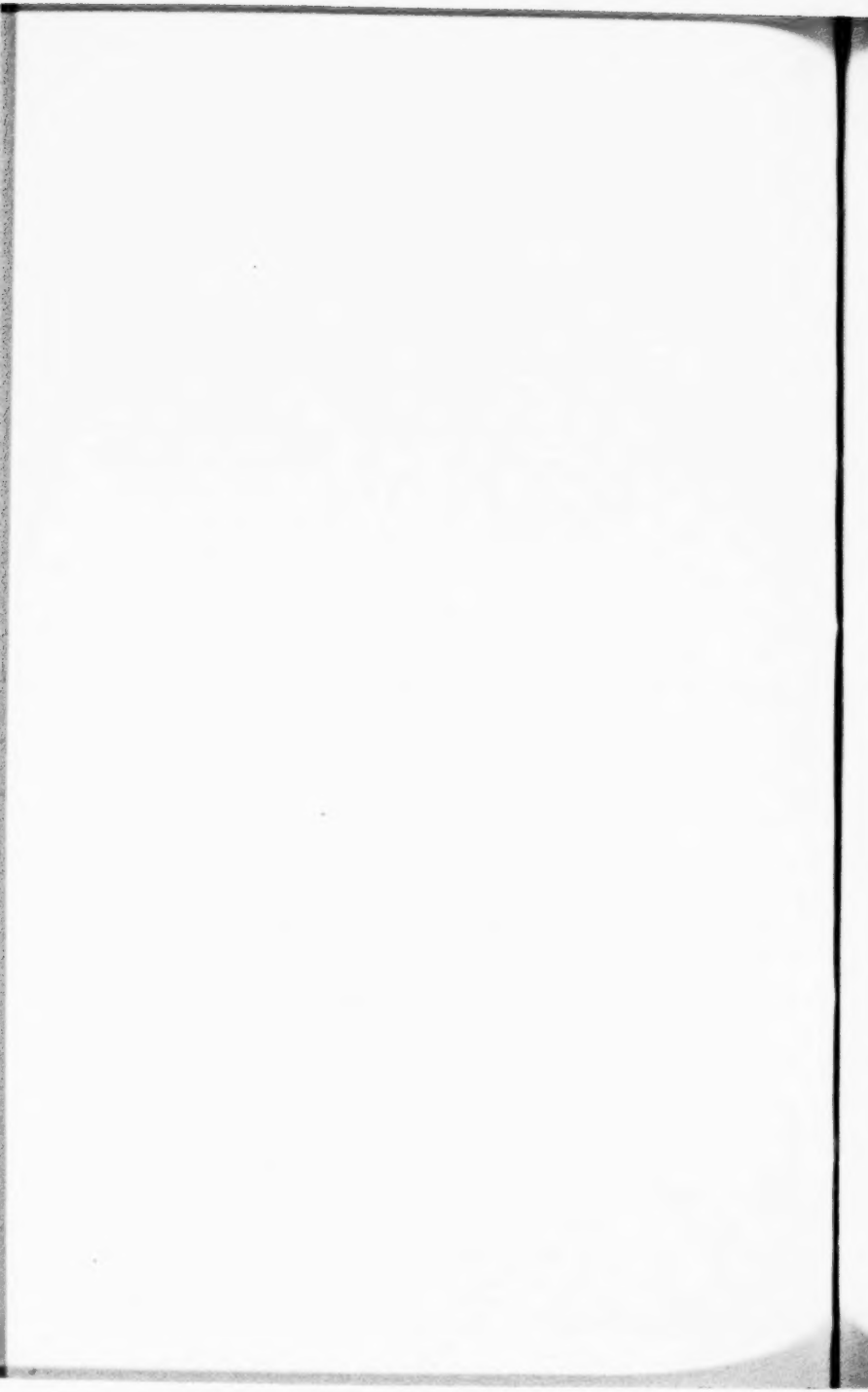
It is respectfully submitted that the appeal is wholly without merit and should be dismissed.

STUART S. BALL,
CECIL I. CROUSE,
JOSEPH A. GREAVES,
H. BLAIR WHITE,
Attorneys for Appellees, The Borden Company and Belmont Dairy Company,

L. EDWARD HART, JR.,
JOHN PAUL STEVENS,
JOHN BORST, JR.,
WILLIAM G. MYERS,
Attorneys for Appellees, Bowman Dairy Company and Ridgeview Farms Dairy, Inc.

Of Counsel:
SIDLEY, AUSTIN, BURGESS & SMITH,
MONTGOMERY, HART, PRITCHARD & HERRIOTT.

26. On April 7, 1954 Judge Igoe entered an order dismissing the Bowman petition.



BLEED THROUGH

BLURRED COPY

APPENDIX.

UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

Dean Milk Company, a Corporation, *Plaintiff*, *vs.* American Processing and Sales Company, Inc., a Corporation, *et al.*, *Defendants.*	Civil Action No. 49 C 1159

MOTION FOR AN ORDER AUTHORIZING THE CLERK OF COURT TO UNSEAL AND OPEN DEPOSITIONS.
Filed January 28, 1953.

The undersigned moves the Court for an order authorizing the Clerk of this Court, on such conditions as the Court sees fit to impose, to open the depositions which are sealed and are on file in this action.

The undersigned is of counsel for the Government in the action pending in this district entitled *United States* v. *The Borden Company, et al.*, Civil Action No. 51 C 947, hereafter referred to as the *Borden* case, which is set for trial before the Honorable William J. Campbell for February 16, 1953.

Said motion is made on the grounds that many of the issues in the two cases are the same and that said depositions contain testimony relating to such issues; that from

time to time the Court in the *Dean* case, at the instance of parties in the *Dean* case, has entered orders requiring the Midwest Office of the Antitrust Division, Department of Justice, to make documents available for inspection of parties in the *Dean* case, and pursuant to said orders and arrangements between counsel for plaintiff and defendants in the *Dean* case, the Antitrust Division has permitted said inspection and said parties have inspected documents which are material to the issues in the *Borden* case and have taken depositions in the *Dean* case relating to said documents; that the opening of the depositions in the *Dean* case for examination by the Government for purposes of the *Borden* case will expedite the trial of the *Borden* case, simplify the issues, and promote the due administration of justice.

Said motion will be based on the affidavit of Ralph M. McCareins annexed hereto and the records in the files of the *Dean* and *Borden* cases.

s/ RALPH M. MCCAREINS,
Attorney for the United States,
Room 400,
United States Courthouse,
219 South Clark Street,
Chicago 4, Illinois,
HArrison 7-4700.

AFFIDAVIT.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Ralph M. McCareins, being duly sworn, on oath states that he is of counsel for the plaintiff in the action pending in this district entitled *United States* v. *The Borden Company, et al.*, Civil Action No. 51 C 947, hereafter referred to as the *Borden* case.

BLEED THROUGH

BLURRED COPY

It appears from records in the file of the action in this district entitled *Dean Milk Company, a Corporation, Plaintiff* v. *American Processing and Sales Company, Inc., a Corporation, et al., Defendants,* No. 49 C 1159, hereafter referred to as the *Dean* case, that the Court in the *Dean* case entered orders on July 25, 1951 and on August 2, 1951 requiring certain of the defendants in the *Dean* case to produce certain documents which were in the custody of the Midwest Office of the Antitrust Division, Department of Justice, that on October 9, 1951 and February 28, 1952, the Court in the *Dean* case entered orders requiring the Midwest Office of the Antitrust Division, Department of Justice, to permit the inspection of documents in the possession of the Antitrust Division by parties to the *Dean* case; that from time to time after July 24, 1951, pursuant to said orders and arrangements between counsel for plaintiff and defendants in the *Dean* case, various parties in the *Dean* case inspected documents in the custody of the Antitrust Division; that the documents so inspected included documents which are relevant to the issues in the *Borden* case and which the Government intends to use in the trial of the *Borden* case.

From the names of witnesses whose depositions were taken in the *Dean* case, it appears that their testimony may relate to documents which are in the custody of the Antitrust Division and which were examined by parties in the *Dean* case as aforesaid and which documents are material to the trial of the *Borden* case.

s/ RALPH M. MCCAREINS.

Subscribed and sworn to before me this 27th day of January, 1953.

s/ KATHRYN M. REILLY,
Notary Public.

My commission expires March 23, 1953.

UNITED STATES DISTRICT COURT.
Northern District of Illinois,
Eastern Division.

Dean Milk Company, a Corporation, *Plaintiff*, *vs.* American Processing and Sales Company, Inc., a Corporation, *et al.*, *Defendants.*	Civil Action No. 49 C 1159.

MOTION FOR CONTINUANCE.
Filed March 11, 1953.

Comes now the United States of America, by its attorneys, Earl A. Jinkinson, Special Assistant to the Attorney General, Harry H. Faris, Thomas M. Kerr, Jr., Bertram M. Long, and Thomas A. Rothwell, Trial Attorneys, and respectfully moves the Court that the motion of the defendants, Bowman Dairy Company and The Borden Company, for a resealing of the depositions heretofore filed in the above entitled cause be continued for the following reasons:

1. That under Rule 6(d) of the rules as made and provided for in the Federal Rules of Civil Procedure, the movant herein, the United States of America, has not been given the five days' notice as provided for by said rule, and, therefore, said movant is entitled to a continuance in said cause;

2. That the United States of America is presently engaged in the trial of a cause entitled *United States of America* v. *The Borden Company, et al.*, Civil Action No. 51 C 947,

BLEED THROUGH

BLURRED COPY

now being heard before the Honorable William J. Campbell, one of the Judges of this Court; that said Court is presently engaged in the taking of oral testimony in said cause;

WHEREFORE, the United States of America respectfully moves that it be granted a continuance in said cause until the case, No. 51 C 947, now pending and being tried, has been fully submitted to the Court, or for five days in accordance with Rule 6(d) of the Federal Rules of Civil Procedure.

s/ Earl A. Jinkinson,
Special Assistant to the Attorney General,

s/ HARRY H. FARIS,
s/ THOMAS M. KERR, JR.,
s/ BERTRAM M. LONG,
s/ THOMAS A. ROTHWELL,
Trial Attorneys,
Room 400,
United States Courthouse,
Chicago 4, Illinois,
HArrison 7-4700.